

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES PHILIP DOUGLAS,

Plaintiff,

v.

DENNIS CHERRY, et al.,

Defendants.

CASE NO. 3:14-CV-05507-BHS-DWC

REPORT AND  
RECOMMENDATION

NOTING DATE: JULY 3, 2015

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. Presently before the Court is Defendants' Motion for Summary Judgment. Dkt. 23.

The Court concludes Plaintiff failed to sufficiently rebut Defendants' motion for summary judgment regarding his Eighth Amendment claims. Further, Plaintiff has failed to state a claim upon which relief can be granted regarding his due process and retaliation claims, and his claims arising from actions occurring outside Stafford Creek Corrections Center. Plaintiff also failed to allege several Defendants were personally involved in the alleged denial of his constitutional rights. Accordingly, the Court recommends granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's claims.

## BACKGROUND

In his Amended Complaint<sup>1</sup>, Plaintiff, an inmate confined at Stafford Creek Corrections Center (“SCCC”), alleges his Eighth Amendment rights were violated when (1) Defendant Patricia McCarty, a correctional unit sergeant, failed to protect Plaintiff from an inmate attack; and (2) Defendants Luis Figueroa, a physician’s assistant, and Wayne Judge, a registered nurse, provided Plaintiff with inadequate medical care. Dkt. 7. Plaintiff also alleges Defendant Stella Jennings violated his due process rights during a disciplinary hearing because his good time credits were taken away without “advisors or staff witness statements.” *Id.* Finally, Plaintiff maintains unnamed SCCC officials retaliated against him, violating his First Amendment rights. *Id.*

Defendants filed the pending Motion for Summary Judgment on March 19, 2015. Dkt. 23. Plaintiff filed his Response on April 13, 2015, and Defendants filed their Reply on April 14, 2015. Dkts. 26, 27. In support of their Motion for Summary Judgment, Defendants submitted affidavits from Defendants Schaller, Cherry, and McCarty and portions of Plaintiff’s medical and prison records. Dkts. 23-1, 23-2. Plaintiff has submitted his Amended Complaint and his Response to Defendants’ Motion for Summary Judgment--both signed under penalty of perjury--and copies of grievances and kites submitted to prison officials. Dkts. 7, 26.<sup>2</sup>

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<sup>1</sup> Plaintiff was ordered to file an Amended Complaint as his original Complaint failed to state a claim. Dkt. 6. The Amended Complaint acts “as a complete substitute for the original and not as a supplement.” *Id.* at p. 4.

<sup>2</sup> Because Plaintiff is *pro se*, the Court “must consider as evidence in his opposition to summary judgment all of [Plaintiff’s] contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [Plaintiff] attested under penalty of perjury that the contents of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

## STANDARD OF REVIEW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” A party asserting a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). All facts and reasonable inferences drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013) (citing *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir.1997)).

As the party moving for summary judgment, Defendants have the initial burden to demonstrate no genuine issue of material fact remains in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010). The movant “always bears the initial responsibility of informing the district court of the basis for its motion,” and identifying those portions of the record, including pleadings, discovery materials, and affidavits, “which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. Mere disagreement or the bald assertion stating a genuine issue of material fact exists does not preclude summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). A “material” fact is one which is “relevant to an element of a claim or defense and

1 whose existence might affect the outcome of the suit,” and the materiality of which is  
 2 “determined by the substantive law governing the claim.” *T.W. Electrical Serv., Inc. v. Pacific*  
 3 *Electrical Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

4 Mere “[d]isputes over irrelevant or unnecessary facts,” therefore, “will not preclude a  
 5 grant of summary judgment.” *Id.* Rather, the nonmoving party “must produce at least some  
 6 ‘significant probative evidence tending to support the complaint.’” *Id.* (quoting *Anderson*, 477  
 7 U.S. at 290); see also *California Architectural Building Products, Inc.*, 818 F.2d at 1468 (“No  
 8 longer can it be argued that any disagreement about a material issue of fact precludes the use of  
 9 summary judgment.”). In other words, the purpose of summary judgment “is not to replace  
 10 conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”  
 11 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). “If a party fails to properly  
 12 support an assertion of fact or fails to properly address another party’s assertion of fact as  
 13 required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting  
 14 materials—including the facts considered undisputed—show that the movant is entitled to it[.]”  
 15 Fed R. Civ. P. 56(e)(3).

## 16 DISCUSSION

17 Plaintiff alleges the following claims in his Amended Complaint: (A) Defendant McCarty  
 18 failed to protect him from an inmate assault; (B) Defendants Figueroa and Judge were  
 19 deliberately indifferent to Plaintiff’s serious medical needs; (C) Defendant Jennings violated  
 20 Plaintiff’s due process rights during a disciplinary hearing; (D) Defendants retaliated against  
 21 Plaintiff for pursuing his claim; and (E) Other Defendants. Dkt. 7.

### 22 A. Failure to Protect

23 Plaintiff alleges Defendant McCarty failed to protect Plaintiff from an inmate attack after  
 24 informing Defendant McCarty he was being harassed by gang members. Dkt. 7, pp. 4-5. The

1 Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety  
2 of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Prison officials have a duty to  
3 protect prisoners from violence suffered at the hands of other prisoners. *Id.* at 833. However, not  
4 every injury suffered by a prisoner at the hands of another is a violation of a prisoner's  
5 constitutional rights. *Id.* at 834.

6 In cases alleging an Eighth Amendment violation based on a failure to prevent harm, the  
7 plaintiff must first meet an objective component by showing "he is incarcerated under conditions  
8 posing a substantial risk of serious harm." *Id.*; see *Clouthier v. County of Contra Costa*, 591 F.3d  
9 1232, 1242 (9th Cir. 2010). The plaintiff must also meet a subjective component by showing the  
10 prison official acted with deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at  
11 834; *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("[A] claim that a prisoner's confinement  
12 violate[s] the Eighth Amendment requires an inquiry into the prison officials' state of mind.").  
13 "[A] prison official cannot be found liable under the Eighth Amendment . . . unless the official  
14 knows of and disregards an excessive risk to inmate health or safety; the official must both be  
15 aware of facts from which the inference could be drawn that a substantial risk of serious harm  
16 exists, and he must also draw the inference." *Farmer*, 511 U.S. at 832; see *Wallis v. Baldwin*, 70  
17 F.3d 1074, 1077 (9th Cir. 1995). A prison "official's failure to alleviate a significant risk he  
18 should have perceived but did not," therefore, cannot "be condemned as the infliction of  
19 punishment." *Farmer*, 511 U.S. at 838.

20 The evidence establishes Plaintiff was involved in an altercation with inmate Hatfield on  
21 December 1, 2013. Dkt. 7, p. 5; Dkt. 23-2, Cherry Affidavit, pp. 18-19, ¶ 3. Plaintiff states he  
22 informed Defendant McCarty of the harassment two weeks prior to the assault by submitting an  
23 "Offender's Kite". Dkt. 7, p. 5. A kite, dated November 24, 2013, shows Plaintiff requested to be  
24

1 moved because “[t]he kid in 27 house keeps wanting to fight me and I don’t want to I’m tired of  
 2 getting harrassed (sic) over on this side” Dkt. 5, p. 6 (“Kite”). But, the Kite was not signed as  
 3 received by a prison official. *Id.* Plaintiff also states he discussed inmate Hatfield with Defendant  
 4 McCarty, whom Plaintiff alleges told him to “[d]eal with it yourself, I’m too busy.” Dkt. 26, p. 3.

5 Defendant McCarty does “not recall ever receiving a statement from [Plaintiff] regarding  
 6 a claim that specific individuals were harassing him.” Dkt. 23-2, McCarty Affidavit, pp. 29-30, ¶  
 7 3. Additionally, Defendant McCarty does not recall receiving the Kite from Plaintiff. *Id.* at ¶ 4.  
 8 She does not have a record of receiving the Kite, and does not believe she ever received the Kite.  
 9 *Id.*

10 After the December 1, 2013 altercation, Plaintiff was found guilty of fighting and, upon  
 11 release from administrative segregation, was moved to a separate unit from inmate Hatfield. Dkt.  
 12 23-2, Cherry Affidavit at ¶ 4. To Correctional Unit Supervisor Defendant Dennis Cherry’s  
 13 knowledge Plaintiff “never requested a spearatee placement from any offender(s) while at  
 14 SCCC.” *Id.* at ¶ 7. After both inmates were placed in administrative segregation, they sent kites  
 15 stating there was no “bad blood between them” and, to Defendant Cherry’s knowledge, there  
 16 were no further incidents between the two inmates. *Id.* at ¶ 4.

17 While Plaintiff may have raised some factual disputes as to the objective component of  
 18 his 8<sup>th</sup> Amendment claim, he has not presented any evidence to satisfy the subjective component  
 19 of his 8<sup>th</sup> Amendment claim where he must show Defendants had knowledge of an excessive risk  
 20 to Plaintiff’s safety and disregarded the risk. Specifically, the evidence shows Plaintiff drafted  
 21 the Kite to Defendant McCarty stating an unnamed inmate wanted to fight Plaintiff. There is no  
 22 evidence showing Defendant McCarty read, signed, or responded to the Kite. Rather, the  
 23 evidence shows Defendant McCarty never received the Kite. As the evidence fails to show  
 24

1 Defendant McCarty read the Kite, she could not have known of and disregarded an excessive  
2 risk to Plaintiff's safety based on the information contained in the Kite. *See Pesina v. Stockwell*,  
3 2012 WL 2395177, \*7 (E.D. Wash. June 25, 2012) (finding the defendant did not know of and  
4 disregard knowledge of an impending assault when he did not receive kites sent by the plaintiff);  
5 *Hards v. Gordon*, 2004 WL 1055664, \* 4 (D. Utah May 5, 2004) (granting summary judgment  
6 for the defendants when the plaintiff was stabbed by gang members housed next to him because,  
7 although the plaintiff gave two kites to guards on duty stating his safety was in danger, there was  
8 no evidence the defendants ever read the kites).

9 Plaintiff also provides a vague statement showing he discussed inmate Hatfield with  
10 Defendant McCarty where he states she told him, "Deal with it yourself, I'm too busy." Dkt. 26,  
11 p. 3. This one statement does not show Defendant McCarty had knowledge of and disregarded an  
12 excessive risk of safety to Plaintiff. There is no information regarding the content of the  
13 conversation, what Plaintiff conveyed to Defendant McCarty regarding inmate Hatfield, and  
14 when the conversation occurred. This one statement fails to show Defendant McCarty had  
15 knowledge of and disregarded an excessive risk of harm to Plaintiff. *See Lujan*, 497 U.S. at 888  
16 (the purpose of summary judgment "is not to replace conclusory allegations of the complaint or  
17 answer with conclusory allegations of an affidavit"); *Celotex*, 477 U.S. at 324 (the nonmoving  
18 party must go beyond his or her own pleadings and designate "specific facts showing that there is  
19 a genuine issue for trial"); *Terry v. Haviland*, 2011 WL 166865, \* 5 (E.D. Cal. May 3, 2011)  
20 (finding vague and bare assertions that the defendant made a retaliatory statement did not  
21 overcome the defendant's motion for summary judgment).

22 Plaintiff fails to demonstrate Defendant McCarty, or any other Defendant, knew of and  
23 disregarded an excessive risk to Plaintiff's safety. *See Farmer*, 511 U.S. at 834. As Plaintiff did  
24

not provide sufficient evidence to refute Defendants' showing that they were not deliberately indifferent to an excessive risk of harm to Plaintiff, no genuine issue of fact remains regarding Plaintiff's failure to protect claim. Thus, the Court concludes Plaintiff's claim of deliberate indifference to an excessive risk of harm cannot survive Defendants' Motion for Summary Judgment.

***B. Indifference to Medical Needs***

Plaintiff's Eighth Amendment medical claim arises from the following allegations: (1) Defendants Figueroa and Judge failed to provide Plaintiff with adequate medical care after Plaintiff complained of a concussion and subsequent blackouts and (2) Defendants failed to properly treat his high cholesterol and skin condition. Dkt. 7, p. 4. "Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal citation omitted); *see Hudson v. McMillan*, 503 U.S. 1, 6 (1992). An Eighth Amendment medical claim has two elements: (1) "the seriousness of the prisoner's medical need and [(2)] the nature of the defendant's response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997) (en banc).

A medical need is serious "if the failure to treat the prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*, 974 F.2d at 1059 (*quoting Estelle*, 429 U.S. at 104). "The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for medical treatment." *Id.* at 1059-1060.



1 If a plaintiff shows he suffered from a serious medical need, he must then show the  
 2 prison officials responded to the serious medical need with deliberate indifference. *See Farmer*,  
 3 511 U.S. at 834. Deliberate indifference “may appear when prison officials deny, delay or  
 4 intentionally interfere with medical treatment, or [ ] may be shown by the way in which prison  
 5 physicians provide medical care.” *Hutchinson v. U.S.*, 838 F.2d 390, 394 (9th Cir. 1988).  
 6 However, “[m]ere negligence in diagnosing or treating a medical condition, without more, does  
 7 not violate a prisoner’s Eighth Amendment rights.” *Id.* Further, mere differences of opinion  
 8 between a prisoner and prison medical staff or between medical professionals regarding the  
 9 proper course of treatment does not give rise to a § 1983 claim. *Toguchi v. Chung*, 391 F.3d  
 10 1051, 1058 (9th Cir. 2004). Deliberate indifference to a prisoner’s serious medical need requires  
 11 “a purposeful act or failure to act on the part of the defendant.” *McGuckin*, 974 F.2d at 1060. In  
 12 other words, “[a] defendant must purposefully ignore or fail to respond to a prisoner’s pain or  
 13 possible medical need.” *Id.*

#### 14 1. Evidence of Treatment History

15 The evidence shows Plaintiff arrived at SCCC in August of 2012, and was seen by  
 16 medical staff on November 6, 2012, for a cholesterol check. Dkt. 23-1, Schaller Affidavit, pp. 2-  
 17 9, ¶ 11. Plaintiff was prescribed Gemfibrozil, a medication used to treat high cholesterol. *Id.*  
 18 Plaintiff “also presented with an unbroken skin issue on his scalp, face, back, and chest;”  
 19 Plaintiff was prescribed Doxycycline and his Hydroxyzine was increased. *Id.* In October of 2013,  
 20 a prescription for Niacin was entered, replacing the prescription for Gemfibrozil. Plaintiff  
 21 submitted a kite stating he could not take Niacin because it was too hard on his “face/skin”. Dkt.  
 22 26, p. 5. This kite was received by “P. Young, LPN”, and Plaintiff was instructed to sign up for  
 23 “provider clinic”. *Id.*

1 Plaintiff was seen by the medical unit again on December 1, 2013, after he was involved  
2 in an altercation with another inmate. Dkt. 23-1, Schaller Affidavit at ¶ 12. An incident report  
3 indicated Plaintiff had abrasions to his back/shoulder area and the side of his head, multiple  
4 scratches on his mid-back, and a small bruise and minor swelling to the back of his head. *Id.* “An  
5 assessment indicated [Plaintiff] was alert and oriented, his pupils were equal and reactive, and  
6 that he had no gait or memory problems noted.” *Id.* at ¶¶ 12, 13. The reports do not indicate  
7 Plaintiff suffered a concussion. *Id.* at ¶13. Plaintiff was also seen by a mental health physician on  
8 January 17, 2014, and the physician noted Plaintiff “displayed no apparent memory  
9 challenges[.]” *Id.* at ¶ 15.

10 Plaintiff was admitted to the inpatient unit at SCCC on March 7, 2014 for chest pains. *Id.*  
11 at ¶ 18. The medical records do not indicate Plaintiff complained of a concussion or subsequent  
12 blackouts at this time. *Id.* Plaintiff did complain of “‘flushing,’ a common side effect of Niacin  
13 cholesterol medicine.” *Id.* “Flushing” is a non-allergic response to the ingestion of Niacin, and  
14 refers to a patient’s skin blushing red. *Id.* This condition can be somewhat uncomfortable, but it  
15 is short-lasting with no long term side effects. *Id.* In response to Plaintiff’s complaints, the  
16 Niacin was discontinued and a new cholesterol medication was prescribed. *Id.*

17 Plaintiff remained in the medical unit at SCCC through March 10, 2014. *See* Dkt. 23-1,  
18 pp. 32-37. He was discharged after his chest pain resolved. *Id.* at p. 35. Plaintiff states Defendant  
19 Figueroa could not determine Plaintiff’s medical issue, and instructed Plaintiff to avoid exercise.  
20 Dkt. 7, p. 5. The medical records show Defendant Figueroa diagnosed Plaintiff with “chest pain  
21 probably GI/anxiety” and noted Plaintiff’s EKG was normal. Dkt. 23-1, p. 35. Plaintiff was  
22 discharged in stable condition, and was instructed to take his medications as prescribed with a  
23 note stating his Niacin would be discontinued. *Id.*

1 Defendant Figueroa treated Plaintiff again on March 12, 2014, for complaints of a  
2 concussion and memory loss. Dkt. 23-1, Schaller Affidavit at ¶ 19. Plaintiff's neurological exam  
3 was normal, and Defendant Figueroa diagnosed Plaintiff with "post head trauma syndrome? v.  
4 depression." *Id.* Defendant Figueroa "ordered labs and made a mental health referral." *Id.*

5 Medical staff scheduled Plaintiff for a follow-up appointment to take place on March 24,  
6 2014; the appointment was rescheduled for March 26, 2014. *Id.*; Dkt. 23-1, 39. Medical records  
7 indicate Plaintiff "no-showed for the appointment." Dkt. 23-1, Schaller Affidavit at ¶ 19; Dkt.  
8 23-1, 39. Additionally, there is evidence Plaintiff was seen by his unit provider, Defendant  
9 Schaller, on March 15 and March 29, 2014, and Plaintiff had his blood drawn on March 19 and  
10 April 25, 2014. Dkt. 7, p. 22. The objective evaluations and laboratory results failed to  
11 substantiate Plaintiff's claims of blackouts and memory loss. *Id.*

12 On April 9, 2014, Plaintiff was taken to medical after he missed prisoner count and was  
13 discovered sitting on a toilet fully clothed. Dkt. 23-1, Schaller Affidavit at ¶ 20. Plaintiff walked  
14 in to the medical unit on his own power and reported "[h]aving [a] stroke before." *Id.* "The initial  
15 assessment that was done indicated that [Plaintiff] was normal and he passed a neurological  
16 exam with no deficits and no sign of stroke." *Id.* Defendant Schaller treated Plaintiff on April 15,  
17 2014. *Id.* at ¶ 23. Cholesterol medication was discontinued because Plaintiff was no longer  
18 taking the medication. *Id.* Plaintiff also reported memory loss and blackouts. *Id.* "He presented as  
19 neurologically intact with no movement or focal neurological issues." *Id.* Defendant Schaller  
20 noted his "impression that Plaintiff was feigning his symptoms and malingering." *Id.*

21 On April 29, 2014, Defendant Schaller saw Plaintiff and noted Plaintiff denied any skin  
22 rashes. *Id.* at ¶ 25. Defendant Schaller did not see any skin rashes, and did not document seeing  
23 any facial scarring. *Id.* Plaintiff reported he "stopped using his hydroxyzine because he thought  
24

1 he may be allergic.” *Id.* During the appointment, Plaintiff was fully alert and oriented, and  
2 neurologically intact. *Id.* Defendant Schaller treated Plaintiff again on June 3, 2014, for a rash on  
3 Plaintiff’s face, scalp, and chest. *Id.* at ¶ 27. Plaintiff already had prescriptions for his rash, and  
4 Plaintiff stated the coal tar shampoo he had been prescribed “helps”. *Id.*

5 Plaintiff’s next communication regarding a need for medical care occurred approximately  
6 six weeks later when he submitted a kite on July 12, 2014 complaining of blackouts from the  
7 December 2013 fight and Alzheimer’s. Dkt. 26, p. 12. Non-party Mike Spencer, Psych  
8 Associate, responded to the kite, and told Plaintiff the medical tests show Plaintiff suffered no  
9 apparent side effects from the December 2013 incident. *Id.*

10 2. Defendants’ Treatment of Plaintiff’s Concussion

11 Plaintiff alleges Defendants failed to properly treat his concussion and subsequent  
12 blackouts. *See* Dkt. 7. Plaintiff states generally the treatment provided by Defendants Figueroa  
13 and Judge was inadequate, and Defendant Figueroa “could not figure out the medical issue” in  
14 March of 2014. *Id.* at p. 5. Plaintiff provides no evidentiary support or details to show these two  
15 Defendants provided inadequate care or acted with deliberate indifference to Plaintiff’s serious  
16 medical needs.

17 Following the December 2013 fight, Plaintiff was seen by medical and provided  
18 treatment. There is no indication Plaintiff suffered a concussion during the fight. Thereafter,  
19 Plaintiff was seen regularly by the prison medical staff. Additional tests showed Plaintiff was  
20 neurologically intact and had no memory problems. Further, Defendant Schaller noted it was his  
21 “impression that Plaintiff was feigning his symptoms and malingering.” Dkt. 23-1, Schaller  
22 Affidavit at ¶ 23.

1 The evidence further shows Plaintiff was treated for chest pain in March of 2014, which  
 2 resolved after three days in the medical unit. Defendant Figueroa diagnosed the chest pain as  
 3 being likely due to gastrointestinal and anxiety issues. Plaintiff was released after the chest pain  
 4 resolved. There is no evidence Plaintiff complained of blackouts at this time. Medical records in  
 5 March and April of 2014 show Plaintiff was seen regularly and was neurologically intact, with  
 6 no signs of a concussion or blackouts. There is no medical evidence supporting Plaintiff's  
 7 contention he suffered from a concussion and subsequent blackouts.

### 8 3. Defendants' Treatment of Plaintiff's Cholesterol Medication and Skin Condition

9 Plaintiff also alleges he was given the wrong cholesterol medication, which may have  
 10 exacerbated his condition, and his skin condition was not adequately treated. Dkt. 7. The  
 11 evidence shows Plaintiff was prescribed Gemfibrozil for high cholesterol. This prescription was  
 12 changed to Niacin, which caused Plaintiff to experience a non-allergic, harmless reaction called  
 13 "flushing". When Plaintiff reported his discomfort to medical personnel, the Niacin prescription  
 14 was discontinued and a new cholesterol medication was prescribed. Further, Plaintiff was seen  
 15 several times for his reported skin problems, and his rashes were treated with prescription  
 16 medications, which Plaintiff reported helped. There is no evidence showing Plaintiff suffered  
 17 from a skin infection while housed at SCCC.

18 In summary, the evidence fails to show Defendants Figueroa or Judge, or the staff at  
 19 SCCC, acted with deliberate indifference to Plaintiff's medical needs and that his medical needs  
 20 were serious. Plaintiff was provided with treatment when requested. Further, the medical  
 21 assessments were normal and the prescribed medications were providing Plaintiff with relief.  
 22 There is no evidence indicating Defendants should have taken additional action to treat  
 23 Plaintiff's medical needs or disregarded any serious medical need.

1 As Plaintiff did not provide the Court with evidence refuting Defendants' showing that  
2 they were not deliberately indifferent to a serious medical need, no genuine issue of fact remains.  
3 Accordingly, Plaintiff's claim of deliberate indifference to a serious medical need cannot survive  
4 Defendants' Motion for Summary Judgment.

5 ***C. Due Process Violation***

6 In his Amended Complaint and Response to Defendants' Motion to Dismiss, Plaintiff  
7 alleges Defendant Jennings violated his due process rights by failing to allow him advisors and  
8 staff witness statements during a disciplinary hearing. Dkts. 7, p. 3; 26, p. 4. Plaintiff contends  
9 this resulted in a loss of good time credits. *Id.*

10 When a prison disciplinary proceeding may result in the loss of good time credits, due  
11 process requires the prisoner receive: "(1) advance written notice of the disciplinary charges; (2)  
12 an opportunity, when consistent with institutional safety and correctional goals, to call witnesses  
13 and present documentary evidence in his defense; and (3) a written statement by the factfinder of  
14 the evidence relied on and the reasons for the disciplinary action." *Superintendent,*  
15 *Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454 (1985). Here,  
16 Plaintiff provides nothing more than a vague allegation stating he was denied due process  
17 because Defendant Jennings did not provide advisors or staff witness statements during the  
18 hearing. Plaintiff has failed to allege facts sufficient to show Defendant Jennings violated his due  
19 process rights, and the Court concludes this claim should be dismissed. *See Ashcroft v. Iqbal*,  
20 556 U.S. 662, 678 (2009) (the pleading must be more than an "unadorned, the-defendant-  
21 unlawfully-harmed-me accusation").  
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1       ***D. Retaliation***

2       At the end of his Amended Complaint, Plaintiff states, “I am currently losing all of my  
3 points over this as a retaliatory (sic) action by staff here at Stafford Creek and am seeking relief  
4 for this as well.” Dkt. 7, p. 5. To prove a First Amendment claim of retaliation under § 1983,  
5 Plaintiff must show: (1) he was subjected to adverse action; (2) the adverse action was imposed  
6 because of certain conduct; (3) the conduct giving rise to the adverse action is legally protected;  
7 (4) the adverse action chilled the prisoner’s speech; and (5) the adverse action did not advance a  
8 legitimate penological goal. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). In addition,  
9 the plaintiff must show retaliation was the substantial or motivating factor behind the conduct of  
10 the prison official. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977);  
11 *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009).

12       Plaintiff failed to allege facts supporting a claim of retaliation. He has not shown he was  
13 subjected to an adverse action, which was imposed because of legally protected conduct. Further,  
14 he has not alleged his speech has been chilled. Importantly, Plaintiff does not identify a specific  
15 individual who retaliated against him. Accordingly, Plaintiff has failed to allege a retaliation  
16 claim, and the Court concludes this claim must be dismissed.

17       ***E. Remaining Defendants and Claims***

18       Plaintiff identified Dennis Cherry, Gregory Schaller, Patrick Glebe, and James Hansen as  
19 Defendants in his Amended Complaint. Dkt. 7, p. 3. To state a claim under 42 U.S.C. § 1983, a  
20 plaintiff must allege (1) the violation of a right secured by the Constitution and laws of the  
21 United States, and (2) the deprivation was committed by a person acting under color of state law.  
22 *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). A person subjects another to a  
23 deprivation of a constitutional right when committing an affirmative act, participating in  
24

1 another's affirmative act, or omitting to perform an act which is legally required. *Johnson v.*  
 2 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

3 Plaintiff must allege facts showing how a defendant caused or personally participated in  
 4 causing the harm alleged in the complaint. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988);  
 5 *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). Sweeping conclusory allegations against an  
 6 official are insufficient to state a claim for relief. *Leer*, 844 F.2d at 633. A § 1983 suit cannot be  
 7 based on vicarious liability alone, but must allege the defendant's own conduct violated the  
 8 plaintiff's civil rights. *City of Canton v. Harris*, 489 U.S. 378, 385-90 (1989).

9 The Amended Complaint contains no factual allegations regarding any alleged  
 10 wrongdoing by Defendants Cherry, Schaller, Glebe, or Hansen. As Plaintiff has not alleged any  
 11 claims against these four Defendants, the Court finds Defendants Cherry, Schaller, Glebe, and  
 12 Hansen should be dismissed from this action.

13 Plaintiff also identifies several instances of alleged deliberate indifference while he was  
 14 housed at WSP and Clallum Bay Correctional Center ("CBCC"). Plaintiff has failed to show  
 15 how any Defendant named in this case was personally involved in any alleged wrongdoing at  
 16 either WSP or CBCC. Accordingly, Plaintiff has failed to state claims against Defendants  
 17 regarding the alleged constitutional violations which occurred at WSP and CBCC, and these  
 18 claims must be dismissed.

### 19 CONCLUSION

20 Based on the foregoing, the undersigned recommends Defendants' Motion for Summary  
 21 Judgment be granted and all claims be dismissed. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R.  
 22 Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written  
 23 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
 24 objections for purposes of *de novo* review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).



1 Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the  
2 matter for consideration on July 3, 2015, as noted in the caption.

3 Dated this 1st day of June, 2015.

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5 David W. Christel  
6 United States Magistrate Judge  
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